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THE UNITED STATES-CHILE FREE TRADE AGREEMENT: WILL IT STOP INTELLECTUAL PROPERTY PIRACY OR WILL AMERICAN PRODUCERS BE FORCED TO WALK THE PLANK?

*R. Craig Woods**

I. INTRODUCTION

RECENTLY, the U.S. Congress enacted the U.S.-Chile Free Trade agreement (hereinafter US-CFTA) in an attempt, amongst other goals, to protect the rights of intellectual property holders in the United States against piracy in Chile.¹ Music and recordings, videos, books, works of art, and business and entertainment software were specifically targeted for protection. Chile has long been a haven for the pirating of intellectual property created and produced within the United States. Unfortunately, most of the illegal copying of U.S. intellectual property takes place within the borders of Chile, making it almost impossible for the United States to enforce its stringent copyright laws.² Exacerbating the problem, Chile fails to enforce many of its laws that provide added protection to copyright and trademark holders.³ Also, Chile's laws are weak to the point of failing to reach the threshold requirement mandated by the United Nations and the World Intellectual Property Organization for intellectual property.⁴

This note will explain the plight of intellectual property owners in Chile and the potential effects of the US-CFTA on this illegal form of trade. Beginning with the background and history of the US-CFTA and followed by a discussion of the current intellectual property atmosphere in

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1. Office of U.S. Trade Representative, *United States-Chile Free-Trade Agreement*, Ch. 17 (June 6, 2003), available at <http://www.ustr.gov/new/fta/Chile/final/17.ipr.PDF> [hereinafter US-CFTA].

2. International Intellectual Property Alliance, *2002 Special 301: Report on Chile* (2002), at <http://www.iipa.com/rbc/2002/2002SPEC301CHILE.pdf> (last visited Apr. 8, 2004).

3. *Id.*

4. *Id.*

Chile, this note will conclude with the goals of implementing such an agreement, the relevant provisions in the US-CFTA, and the possible legal implications raised as a result of this treaty.

II. BACKGROUND AND HISTORY OF THE US-CFTA

It is important to first understand the history of the United States and Chile as strategic economic and political allies. The United States has long supported Chilean political movements favorable to U.S. democratic ideals.⁵ Furthermore, Chile has fostered a strategy of liberal economic policies designed to steadily grow the country's business sector.⁶ As such, this strategy has led to an added emphasis by the two countries in formulating a trade agreement designed to strengthen economic and political relations and to provide protection for U.S. producers within Chilean markets.

A. THE FORMATION OF THE US-CFTA

The origins of the US-CFTA date back to 1994 when certain strategic countries enacted the North Atlantic Free Trade Agreement (NAFTA). As a display of the future goodwill between the United States and Chile, the United States government guaranteed Chile a future place in NAFTA's administration.⁷ Later, on November 26, 2000, U.S. President Bill Clinton and Chilean President Ricardo Lagos announced the beginnings of a proposal between the two countries, what is now the US-CFTA.⁸ Not yet completed at the end of President Clinton's term, President George Bush continued negotiating the agreement until its recent inception on June 6, 2003.

B. WHY FOSTER AN ECONOMIC ALLIANCE WITH CHILE

Many "out of favor" countries have wondered at the long history of "outsized attention" that the United States has bestowed on Chile.⁹ Economically, Chile's gross domestic product is only seventy billion dollars, and its borders contain only fifteen million people.¹⁰ Chile's former president during the 1960's, Frei Montalva, once commented that "if the long sliver of land that is [my] country slipped off into the Pacific, the rest of the world would barely notice."¹¹

5. Sidney Weintraub, Center for Strategic and International Studies (CSIS), *The U.S.-Chile Connection* (June 2001), at <http://csis.org/simonchair/issues200106.htm> [hereinafter Weintraub].

6. *Id.*

7. *Id.*

8. Heather Corbin, Note, *The Proposed United States - Chile Free Trade Agreement: Reconciling Free Trade and Environmental Protection*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 119 (2003); J.F. Hornbeck, U.S. Department of State, *CRS Issue Brief: The U.S.-Chile Free Trade Agreement* (Mar. 2001), at <http://fpc.state.gov/6123.htm>.

9. Weintraub, *supra* note 5.

10. *Id.*

11. *Id.*

Most argue that the benefits available to the United States are symbolic or are based on future potential benefits.¹² Chile, for instance, has long been a bastion for democracy and political stability within South America.¹³ Throughout the 1970's and 1980's, the United States supported movements within Chile to promote a democratic form of government.¹⁴ Economically, Chile provides a market that is relatively stable and growing steadily. Strategists argue that an agreement with Chile imparts future economic benefits through reduced tariffs, supplies a foundation for other proposed trade agreements between the United States and South American countries, expands a market that already produces \$7 billion annually, and "provide[s] an opportunity for America to set precedents and develop innovative approaches to electronic commerce, services trade, trade-related labor and environmental questions, and other cutting-edge trade issues."¹⁵ Notably, this would be the first trade agreement implemented between the United States and a South American country, exemplifying how large and small countries can effectively negotiate favorable economic and social policies.¹⁶

U.S. intellectual property manufacturers conduct vast amounts of business within Chile. Of the \$7 billion of trade between the United States and Chile, the majority is in the form of computers, software, music, pharmaceuticals, and high-tech machinery.¹⁷ In 2001, before the passage of the US-CFTA, estimated trade losses due to piracy in Chile were \$51.1 million.¹⁸ The increase in trade and subsequent piracy has led to an increased need for intellectual property protection—a need potentially fulfilled by the US-CFTA.

III. INTELLECTUAL PROPERTY PIRACY IN CHILE

The current atmosphere for intellectual property protection within Chile is less than optimal. Chile historically retains an incumbent position on the Special 301 "Nations to Watch" list and is responsible for millions of dollars lost each year from piracy and black market operations.¹⁹ In 2002 alone, Chile's piracy rate was 51 percent of potential intellectual property revenues leading to \$45 million lost by the high tech

12. *Id.*; Edward Gresser, Progressive Policy Institute, *The U.S.-Chile Free Trade Agreement: Concrete Benefits, Strategic Value* (May 17, 2001), at <http://www.ppionline.org> [hereinafter Gresser].

13. Gresser, *supra* note 12.

14. Weintraub, *supra* note 5.

15. Gresser, *supra* note 12.

16. J.F. Hornbeck, Congressional Research Service (CRS), *The U.S.-Chile Free Trade Agreement: Economic and Trade Policy Issues*, at http://www.chileusafra.com/save_images/res_pdf3e402a8510849be1_4228.pdf (last visited Apr. 8, 2004).

17. *Id.*

18. International Intellectual Property Alliance, 2003 "Special 301" Decisions And IIPA Estimated U.S. Trade Losses Due To Copyright Piracy: The Americas, at http://www.iipa.com/pdf/2003_June_Americas_LossUpd.pdf (last visited Apr. 8, 2004) [hereinafter Estimated U.S. Trade Losses].

19. *Id.*

industry within Chile's borders.²⁰ The amount of loss for certain items in 2002 was sizable: motion pictures—(\$2 million); sound and music recordings—(\$14 million); business and entertainment software—(\$59.1 million)²¹; and books—(\$1.1 million).²² Chile also retains a significant stake in protecting intellectual property because it is estimated that in 1999 alone, Chile's economy lost \$50 million to software piracy.²³

Since 2002, intellectual property theft in Chile has increased.²⁴ Low levels of government attention have led to contraband and illegal sales in almost all major Chilean cities.²⁵ Most copying is done within the country on unformatted disks and cassettes that enter the country easily through major airports and seaports.²⁶ Additionally, common street vendors, who are often protected by the local mayors, facilitate distribution of these items.²⁷

A. MUSIC AND RECORDINGS

There has been a dramatic decline in the domestic music and recordings industry within Chile, causing increased piracy of U.S. and local music recordings. Because of the lack of relevant legal protection for music, many companies have been forced to decrease their staffs.²⁸ Furthermore, many retail chains have shut down, thus leading to an increased amount of activity in trafficking of pirated compact disks (CDs).²⁹

B. AUDIOVISUAL AND VIDEO PIRACY

Chile's high unemployment rate has driven audiovisual and video piracy.³⁰ Most of the items are counterfeit movies and printed cover sheets that are sold in flea markets by individuals, but there has been a growing amount of illegally imported North American formatted DVDs by organized crime syndicates.³¹ Such unregulated thievery has led to a restrictive market for legitimate home movie rentals and sales.³²

20. Capital Hill Senate Finance Hearing Testimony by James Jarrett, Vice President, Worldwide Government Affairs for Intel Corporation (June 17, 2003), at <http://finance.senate.gov/sitepages/hearing061703.htm>.

21. The current amount for entertainment software is unavailable, but it was \$41 million in 2000. International Intellectual Property Alliance, *2003 Special 301: Report on Chile* (2003), at <http://www.iipa.com/rbc/2003/2003SPEC301CHILE.pdf> (last visited Apr. 8, 2004) [hereinafter IIPA Special Report 2003].

22. *Id.*

23. *Software Piracy Costs Chile Over 100 Million Dollars in Losses*, EFE NEWS SERVICE, Apr. 19, 2000, available at LEXIS/News Group/All News Group File.

24. IIPA Special Report 2003, *supra* note 21.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

C. BOOKS AND WORKS OF ART

Most books being copied and resold are educational resources reproduced at private stores and university sponsored book shops.³³ While there is some pirating of U.S. best sellers, most of the authors hurt by this form of thievery are Chilean or Mexican writers who produce their works in Spanish.³⁴ Some attribute the level of piracy to the high value added tax of 18 percent charged on all literature.³⁵

D. BUSINESS AND ENTERTAINMENT SOFTWARE

Most trafficking in the software market takes the form of video games, CD-ROMs, and multimedia entertainment products.³⁶ In fact, approximately 700 firms within Chile who are responsible for reproducing large amounts of computer software do not have a valid license.³⁷ One article explains, “although [Chile] has relatively low rates [of piracy] compared to the other countries in Latin America, Chile’s software piracy rate is still 51 percent [of gross intellectual property revenues], according to the report. This means that more than a half of the software being used in Chile is illegal.”³⁸

IV. WHY PIRACY HAS FLOURISHED

To understand the situation that the US-CFTA seeks to address, it is necessary to have full knowledge of the problems Chile currently faces with enforcing intellectual property rights within its borders. Many economists argue that the US-CFTA is theoretically workable but a legal impossibility in practice. The substantial barriers to the US-CFTA’s success stems from Chile’s inability to enforce the copyright protection laws of its country and to become compliant with Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS).³⁹

A. TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

All World Trade Organization (WTO) members, including Chile, are subject to the stringent piracy policies found within TRIPS. TRIPS puts pressure on member countries to enforce the copyright rules of its lo-

33. *Id.*

34. *Id.*

35. Global Trade Negotiations Home Page, *Chile Summary*, at www.cid.harvard.edu/cidtrade/gov/chilegov.html (last modified Feb. 2003).

36. *Id.*

37. Strategic.gc.ca, *Chile-Computer Software Products-Competitive Situation* (Dec. 21, 1998), at <http://strategis.ic.gc.ca/SSG/dd74812e.html>.

38. Victor Henriquez, *Chile Has Second Lowest Level of Software Piracy*, THE SANTIAGO TIMES, Oct. 6, 2003, available at <http://www.chirongroup.com>.

39. Estimated U.S. Trade Losses, *supra* note 18; International Intellectual Property Alliance, *WTO TRIPS Implementation*, at <http://www.iipa.com/trips.html> (last visited Apr. 8, 2004); International Intellectual Property Alliance, *Copyright Enforcement Under the Trips Agreement* (June 14, 2002), at http://www.iipa.com/rbi/2002_Jun14_TRIPS_General.pdf [hereinafter Copyright Enforcement].

cale.⁴⁰ The agreement is unique because it strengthens a dispute settlement system designed to deter future copyright violations and brings member nations into compliance with WTO standards.⁴¹

B. CHILE'S INABILITY TO BECOME TRIPS COMPLIANT

Several factors are cited as problems with the current system of copyright enforcement in Chile. First, there is a lack of any meaningful punishment to deter future violators of intellectual property laws.⁴² Raids are temporarily effective, but the local judicial branches abandoned most copyright cases.⁴³ In 2000, Chile passed a new law designed to facilitate the judicial process and promote greater efficiency by separating the handling of cases into both an investigatory and decision-making function.⁴⁴

Specifically, Chile has made good faith efforts to combat piracy by passing a zero tolerance policy. Chile's policy seeks to deter black market operations by maintaining a consistent public presence, incorporating both local police officers and members of the recording industry. However, enforcement is often sporadic, and officials fail to police popular venues for contraband during the weekend daytime hours, allowing infringers to violate Chile's piracy laws at will.⁴⁵ Software infringement actions and literary copyright violations are also virtually non-existent as only one case was brought in 2001.⁴⁶ There has been some accomplishment in controlling the influx of illegal videogame consoles and cartridges, because customs officials have seized numerous cargo containers at Chile's air and seaports, but such successes are not common.⁴⁷

The second major problem for Chile in becoming TRIPS compliant is its lack of an effective search mechanism for counterfeit goods.⁴⁸ The rule in Chile is backwards because it requires notification of the party before a search is conducted. Notification is not always required, but it demands that the private party hire an investigator and bear the entire expense.⁴⁹

Additionally, there are relevant problems with Chile's civil legal process. Cases brought by copyright holders often take longer than two years, but there is no provision in Chile's law for statutory damages and there is no administrative agency charged with guarding the intellectual property within Chile.⁵⁰ The lack of a timely and efficient civil legal system fails to deter future infringers of Chile's intellectual property laws because those involved in the black market realize that the chances of

40. Copyright Enforcement, *supra* note 39.

41. *Id.*

42. IIPA Special Report 2003, *supra* note 21.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

being formally charged in a court of law are minimal. These inefficiencies are problematic as other neighboring countries have taken effective steps towards enforcing copyright laws by deputizing certain agencies and providing statutory damages.⁵¹

Last, Chile has ineffective customs regulations, allowing a deluge of contraband to illegally cross its borders.⁵² Even with probable cause, rights holders are unable to prevent goods from entering the country because Chile lacks adequate amounts of human and financial capital to effectively monitor inter-country activities.⁵³ Without proper border mechanisms, illegal intellectual property reproductions cross Chile's borders unchecked forcing rights holders to wait for the stolen item to appear in the marketplace before filing suit in a civil system that ultimately fails to enforce piracy regulations.

V. SUMMARY OF INTELLECTUAL PROPERTY PROVISIONS WITHIN US-CFTA

The US-CFTA attempts to force Chile into compliance with the provisions of the TRIPS agreements already imposed on Chile by its membership in the WTO. The stated goals of the trade agreement are to "promote greater efficiency and transparency in the administration of intellectual property systems" and to build on the foundation of TRIPS.⁵⁴ The relevant provisions of the agreement focus on the areas of trademarks, copyrights, patents, and enforcement against violators of international piracy laws.⁵⁵ These vital aspects of the agreement attempt to provide protection equal to that offered under U.S. law and are modeled after successful U.S. copyright statutes.⁵⁶

The main provisions of trademark protection within the US-CFTA espouse the first-in-time, first-in-right principle, meaning that the first to register a name will be afforded the first right to protection.⁵⁷ Furthermore, the US-CFTA disallows internet-squatters, which are individuals using registered trademarks as internet domain names, from proliferating on the web.⁵⁸

The new agreement also protects copyright holders by allowing them to retain the rights to temporary copies of their music, videos, software, and text on individual personal home computers, sheltering the owner from

51. *Id.*

52. *Id.*

53. *Id.*

54. US-CFTA, *supra* note 1.

55. *Id.*; State Department, *USTR Calls Agreements with Chile and Singapore "Comprehensive"* (June 17, 2003), available at LEXIS/News Group/Washington File [hereinafter *Comprehensive*].

56. Committee on Ways And Means, *Statement on How the United States-Chile Free Trade Agreement Makes Progress in Achieving U.S. Purposes, Policies, Objectives, and Priorities*, at <http://www.waysandmeans.house.gov> (last visited Apr. 8, 2004) [hereinafter *Statement*].

57. *Comprehensive*, *supra* note 55.

58. *Id.*

illegal distribution on the internet.⁵⁹ Much like in the United States and abroad, copyright holders are now given a longer period of protection.⁶⁰ The agreement also prohibits the government from using illegal copies of registered software and bars consumers from tampering with anti-pirating codes placed on audiovisual and software products.⁶¹ Last, the agreement calls for limited liability for internet service providers in an attempt to balance legitimate and illegitimate use by the common consumer.⁶²

Furthermore, the US-CFTA grants expansive rights to previously unprotected inventors and scientists. The new agreement makes rights available for inventions and extends the period for filing when there are unnecessary delays in granting the application for a patent.⁶³ The new provisions also provide consumer and producer transparency because they make the requirements to revoke and register a patent the same, thus reducing the amount of arbitrary revocations.⁶⁴ The US-CFTA contains provisions that protect test data used in producing pharmaceuticals from being released to the public for a period of five years and disallows government marketing agencies from advertising illegal products.⁶⁵

The new agreement seeks to make strides in bringing Chile into TRIPS compliance and in strengthening the area of intellectual property enforcement. First, the US-CFTA requires both governments to punish end-user piracy with the goal of deterring future violations of local copyright laws.⁶⁶ End-user piracy occurs when one illegally copies licensed software and products without proper authorization. The Chilean government guarantees its authority to seize and destroy contraband and the equipment used to produce illegally copied software and to provide stricter penalties and enforcement at the country's borders and ports.⁶⁷ Furthermore, the US-CFTA dissolves the mandatory filing request for property searches and gives authorities the power to proceed on their own initiative.⁶⁸ Last, statutory damages will now be imposed even in instances where economic harm is difficult to measure.⁶⁹

VI. WILL THE US-CFTA WORK?—A LOOK AT NAFTA

There are many questions intellectual property owners have regarding the future of their products in Chile; most notably, will the US-CFTA provide adequate protection for their copyrighted work? Since the

59. Statement, *supra* note 56.

60. Comprehensive, *supra* note 55.

61. *Id.*

62. Office of U.S. Trade Representative, *Summary of the U.S.-Chile Free Trade Agreement* (Dec. 11, 2002), available at http://www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile_summary.pdf [hereinafter Summary].

63. *Id.*; Statement, *supra* note 56; Comprehensive, *supra* note 55.

64. Summary, *supra* note 62.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

agreement is in its infant stages of implementation, and has yet to provide quantifiable statistics by which to measure its success, other countries with rampant piracy that also have signed free trade agreements with the United States serve as potential benchmarks. Mexico serves as an accurate approximation of Chile's future success because of its geographic proximity to Chile. Mexico is also an appropriate benchmark due to its involvement in the North American Free Trade Agreement.

NAFTA is similar to the US-CFTA in that it implements strong intellectual property controls and requires Mexico's compliance with TRIPS standards. While in theory the agreement strengthens intellectual property laws within Mexico, it has failed in practice because there have been no improvements in piracy levels as recently as 2002.⁷⁰ In fact, piracy in all sectors of Mexico has steadily increased since NAFTA's inception in 1994, leaving legislators and prospective tradesmen to wonder at the benefits of copyright protection in free trade agreements.⁷¹ The main reason for a lack of effective controls in Mexico has not been due to the level of protection provided by the NAFTA. Rather, the situation has stemmed from the inability of Mexico to effectively enforce the provisions of the agreement.⁷²

VII. CONCLUSION

In theory, the US-CFTA provides strong controls for producers of intellectual property. It establishes Chilean compliance with TRIPS in the areas of trademarks, patents, copyrights, and its enforcement standards. Moreover, it provides stricter measures for border policing and allows law enforcement officers to perform searches of suspected criminal activities without prior notice. These provisions have the potential to make significant strides by decreasing the amount of illegal activity within Chilean borders.

However, any degree of positive speculation premised on the added protections of the US-CFTA should be met with an equal degree of skepticism. Chile has a long standing role on the International Intellectual Property Alliance's watch list and has experienced steady increases in piracy from year to year. Furthermore, as evidenced by Mexico's problems curtailing piracy under NAFTA, an agreement that employs most of the same policies as the US-CFTA, enforcement of intellectual property rights can be difficult to achieve in South American countries.

70. International Intellectual Property Alliance, *1999 Special 301: Report on Mexico*, at http://www.iipa.com/rbc/1999/rbc_mexico_301_99.html (last visited Apr. 8, 2004) [hereinafter Mexico]; International Intellectual Property Alliance, *IIPA 2003 Special 301: Decisions and IIPA Estimated U.S. Trade Losses Due To Copyright Piracy*, at http://www.iipa.com/pdf/2003_June_Americas_LossUpd.pdf (last visited Apr. 8, 2004).

71. *Id.*

72. Mexico, *supra* note 70; Robin Ann King, *Copyright Protection and Piracy in the Latin Music Market* (Feb. 1998), at <http://www.acceso-access.com/musiccopyright.htm>.

Local law enforcers are often met with stiff opposition from corrupt public officials and organized crime. Many times, governmental funding is insufficient to support the amount of surveillance needed to discourage potential infringers, and when criminals are finally caught, the judicial system's inefficiencies result in negligible amounts of deterrence. Simply, there is insufficient incentive in place to dissuade perpetrators from returning to the street and plying the same illegal trade. Also exacerbating the problem are the high levels of unemployment prevalent throughout South America. High unemployment rates encourage survival through increased piracy and black market operations.

The U.S.-Chile Free Trade Agreement seeks to foster increased trade and to forge future strong relations with South American countries. Unfortunately, the current Chilean government lacks the means to enforce the US-CFTA and is unable to meet the intellectual property demands implemented in the agreement. Admittedly, the trade initiative is recent and there is room for improvement, but improvement must come in the form of added initiatives by the Chilean government to provide adequate enforcement of the provisions within the US-CFTA.